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## Constitutional Heresy?

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## CONSTITUTIONAL HERESY?

MARK R. KILLENBECK\*

Every year, every one of us who teaches an introductory course in constitutional law is forced to make extraordinarily difficult decisions about what to include and what to leave out of the syllabus. In particular, after settling on which aspects of the subject we will teach, we confront the reality that we simply cannot ask our students to read all the cases that really matter. Borrowing from one of my favorite poets and poems, we do not have “world enough and time.”<sup>1</sup>

In the face of this, in each of the past several years, I have contemplated committing constitutional heresy. In the main, my students want to learn what they need to pass the bar examination. For most of them, that means they want me to tell them the so-called Black Letter Rules. The reality that a given constitutional rule provides a starting point, rather than an answer, does not much concern them. Case X involves a claim of discrimination on the basis of race. What’s the rule? The simple answer is strict scrutiny: “all racial classifications . . . must be analyzed . . . under strict scrutiny” and “are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”<sup>2</sup> The fact that the Supreme Court has provided scant guidance about how we are to tell the difference between an interest that is “compelling” and one that is simply “important,” the standard invoked for classifications based on gender,<sup>3</sup> troubles them, if at all, only a little. Narrow tailoring in turn, requires a delicate, case-by-case fact-sensitive review by the Court. Each of the particular means selected must be “specifically and narrowly framed to accomplish that purpose.”<sup>4</sup> Who cares!! What’s the Rule!!

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1. The line is from Andrew Marvel, *To His Coy Mistress*, which may be found in many places, including in the truly great collection, FRANCIS CONNOLLY, *MAN AND HIS MEASURE* 535–36 (1964).

2. *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

3. *See United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (explaining that gender-based discrimination requires “an exceedingly persuasive justification,” which means the State must show that the challenged classification serves “important governmental objectives” and that the discriminatory means used are “substantially related to the achievement of those objectives” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

4. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

More to the point, virtually none of our students will on graduation, or throughout their subsequent careers, “practice” constitutional law. The Constitution will structure and direct virtually every aspect of their professional lives. But actual, living breathing constitutional law clients and claims will by and large not occupy their time.<sup>5</sup> Moreover, few, if any, will ever participate in a case posing the issues that most people associate with the construct, constitutional law. And so, I ask myself, repeatedly, why am I wasting my time teaching *Brown v. Board of Education*?<sup>6</sup>

Don’t get me wrong. *Brown* is a great case. The Court’s opinion triggered a series of defining moments in American legal, political, and social history. Nevertheless, what exactly does it contribute in a course that supposedly prepares our students for the actual practice of law? As I will note and argue, the honest answer is practically nothing. Especially when the students learn that the “rules” that govern any school desegregation claims today were not promulgated in *Brown*.<sup>7</sup> But as I will also note and argue, this vision of what we do elevates law over justice, and it is my continuing rejection of that path that has, at least to date, saved me from the ultimate constitutional sin.

#### I. CONSTITUTIONAL CONTEXTS

The body politic generally thinks of the Constitution in ways that reduce its scope and meaning to the core guarantees of the Fourteenth Amendment. This is understandable. We live in a country that (mostly!) celebrates Thomas Jefferson’s misleading embrace of “truths” that are “self-evident,” “equality,” and “unalienable rights,”<sup>8</sup> supplemented by the Pledge of Allegiance’s

5. One possible exception is the extent to which they prosecute or defend those accused of crimes. There is a substantial body of what we might call constitutional criminal procedure that permeates such matters, involving claims under the Fourth, Fifth, Sixth, and Eighth Amendments. Those provisions and cases are, however, not taught in a constitutional law course per se and not generally viewed as parts of the “real” constitutional regime. See Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1128–29 (1996).

6. 347 U.S. 483 (1954). This is the first of two decisions by the Court so-styled. The second is known as *Brown II*. 349 U.S. 294 (1955). It focused on remedies, answering the two questions the Court posed to the parties in *Brown I*. My references to *Brown* in the main text of this article are to *Brown I*. Virtually no one thinks of it that way, and I will not so describe it.

7. See *infra* notes 6, 44, 45, 52 and accompanying text.

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Jefferson who penned those words was also the Jefferson who owned slaves and, in an extended meditation on government and human nature, “advance[d] . . . as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind.” THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 180 (David Waldstreicher ed., Palgrave Publishers Ltd. 2002) (1788). This and similar sentiments voiced at the time the Constitution was drafted and ratified cast an interesting light on both Jefferson and on Chief Justice Roger Brooke Taney’s opinion for the Court in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). See *infra* note 73 and accompanying text.

celebration of a land in which there is “liberty and justice for all.”<sup>9</sup> If, as Justice Wiley Rutledge declared in the wake of World War II, the difference between the United States and the Axis powers was that we lived in a land where the Constitution establishes a regime of “[l]aw, freedom, and justice,”<sup>10</sup> then surely those portions of the Constitution most directly associated with those precepts matter the most. Which makes it arguably appropriate to reduce it to a document that bars “depriv[ations] of life, liberty, or property without due process of law” and forbids “den[ials of] . . . the equal protection of the laws.”<sup>11</sup>

Law students enter their first constitutional law course with visions of affirmative action, abortion, flag burning, same-sex marriage, and the like dancing in their heads. They are then understandably shocked and appalled when they learn that the constitutional provisions that will actually matter in their future practice are far removed from these hot button issues. Standing? Yuck. The Commerce Clause? Double yuck, since it has both positive and negative dimensions.<sup>12</sup> Egad! Where is the Constitution we envisioned?

This due process/equal protection fixation is understandable. These are the constitutional provisions that best articulate American notions of justice and fair play. They are also constitutional provisions at issue in a minuscule portion of the cases litigated before the Supreme Court, albeit the ones that feature in a majority of those that actually command public attention. Very few people understand that the Court’s docket is dominated by issues and controversies far removed from the sexy parts of the Constitution. As I write, thirty-two cases have been accepted for argument and decision in October Term, 2017.<sup>13</sup> Only four of them involve the sorts of issues most people think of as “constitutional.”<sup>14</sup> The remainder are relatively obscure matters of statutory and

9. For a general discussion of the Pledge and the constitutional issues it poses, see Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 530 (2007).

10. WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 10–11, 18 (1947).

11. I insert here the obligatory footnote making it clear that the quoted language may be found in U.S. CONST. amend. XIV, § 1, and add the observation that anyone who needs a proper Bluebook citation to find the source of that language probably won’t understand it or much of what follows in this Article.

12. For a dose of reality in such matters, see Mark R. Killenbeck, *A Prudent Regard to Our Own Good? The Commerce Clause, in Nation and States*, 38 J.S. CT. HIST. 281 (2013) (noting the central place of the Commerce Clause in matters constitutional).

13. *October Term 2017*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2017> [<https://perma.cc/6Q4D-R786>]. The numbers will have changed by the time this article is in print. The pattern of high-profile core constitutional issues as the exception rather than the rule will remain.

14. Two of the four grow out of the Trump administration’s executive orders on immigration. *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 551 (D. Md. 2017), *aff’d* in part, *vacated* in part, 857 F.3d 554, 606 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017); *Hawai’i v. Trump*, 245 F. Supp. 3d 1227, 1231 (D. Haw. 2017), *vacated* in part, *remanded* in part, 859 F.3d 741, 789 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017). One focuses on partisan

regulatory interpretation, often mired in the constitutional equivalent of President Bill Clinton's ruminations on "what the meaning of *is* is."<sup>15</sup>

This does not mean that constitutional issues and concerns do not lie deep within virtually every case that comes before the Court. No actor in the federal system can undertake anything without constitutional authority. Many areas of practice invoke constitutional rules and norms, if only in passing.<sup>16</sup> That said, the vast majority of the cases litigated in our system are not the sort of matters that long detain those who wax eloquent about the "great" constitutional principles and rules.

The reality is that few, if any, individuals care much about the details of the Court's actual work, much less the vast bulk of what constitutes "constitutional law." Consider for just a moment the Court's October 2017 Term. The cases everyone is talking about as October 2, 2017, approaches are not those that involve parsing the nuances of, for example, the Federal Rules of Appellate Procedure.<sup>17</sup> Or, as will be the situation in the first cases argued this Term, the intricacies of the intersection between two federal statutes.<sup>18</sup> No. They are the ones involving the Fourteenth Amendment. In some instances, either due process or equal protection is directly addressed. In the forthcoming partisan gerrymandering case, for example, the questions presented pose variations on the "one-person, one-vote" principle, which is an equal protection claim.<sup>19</sup> In

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gerrymandering. *Whitford v. Gill*, 218 F. Supp. 3d 837, 844 (W.D. Wis. 2016), *prob. juris. noted*, 137 S. Ct. 2268 (2017). The final one presents a combination of compelled speech and free exercise claims. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 370 P.3d 272, 276 (Colo. Ct. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017).

15. For an excellent example of where the travails of statutory interpretation might lead us, see *Yates v. United States*, 135 S. Ct. 1074, 1091 (2015) (Kagan, J., dissenting) (resorting to Dr. Seuss's book, *One Fish, Two Fish, Red Fish, Blue Fish*, in the course of a discussion about whether fish are "tangible objects" for the purposes of a prosecution for "destruction or removal of property"). On Bill Clinton and his linguistic gymnastics, see Michael Novak, *President of All the People*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 337, 353 (2002) ("Clinton was willing to take any perspective on *is* that won him a moment's affection and support. He hung loose with metaphysics.").

16. Virtually all attorneys in virtually all areas of practice, for example, will at some point consider whether a given procedure meets the due process thresholds articulated in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). There is nevertheless a substantial difference between the claim that Procedure X did not reduce or eliminate "the risk of an erroneous deprivation of such interest through the procedures used," *id.* at 335, and constitutional law writ large.

17. See, e.g., *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13 (2017) (holding that Federal Rule of Appellate Procedure 4(a)(5)(C) is a non-jurisdictional claim processing rule).

18. See, e.g., *Epic Sys. Corp. v. Lewis*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (exploring whether the terms of an employer/employee agreement to invoke arbitration is enforceable under the Federal Arbitration Act in contravention of the National Labor Relations Act).

19. See *Gill*, 218 F. Supp. 3d at 844 ("[S]tate legislatures must ensure that districts are approximately equal in population, so that they do not violate the 'one-person, one-vote' principle embedded in the Equal Protection Clause of the Fourteenth Amendment.").

other cases, the connection to the Fourteenth Amendment is indirect, via the selective incorporation principle, which makes most of the provisions of the Bill of Rights applicable against the states. For example, in one case currently commanding widespread public attention, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Jack Philips is claiming that he can refuse to provide his services to a same-sex couple as a matter of free speech and free exercise of religion. That triggers First Amendment scrutiny only because the Due Process Clause of the Fourteenth Amendment makes those protections applicable against the states.<sup>20</sup>

The most recent Supreme Court nomination and confirmation brouhaha amply illustrates this reality. Battles rage each time someone is nominated to fill a vacant seat on the Court. Each of the many groups that claim a right to pontificate on such matters has a lens through which it views the nominee. Invariably, that lens is the Fourteenth Amendment. Pundits and the body politic worried at length about Judge Neil Gorsuch's views on the usual suspects. I must confess that I paid scant attention to the confirmation process and debates. Predictably, the Editorial Board of *The New York Times* focused its initial salvos on potential "negative consequences for workers' rights, women's reproductive freedom, politics uncorrupted by vast sums of dark money, the separation of church and state, the health of the environment and the protection of the most vulnerable members of society."<sup>21</sup> As the day of reckoning came closer, it returned to these themes, lamenting the potential arrival of a Justice likely to support "consistently conservative results," highlighting "women's access to contraception" and "abortion rights and affirmative action."<sup>22</sup>

To be fair, some news coverage focused on Justice Gorsuch's views about whether courts should defer to an administrative agency's interpretation of a statute.<sup>23</sup> Such forays were the exception rather than the rule. I am accordingly confident that few if any of the individuals or groups that assumed center stage

20. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech [is] . . . protected by the due process clause of the Fourteenth Amendment from impairment by the States."); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

21. Editorial, *Neil Gorsuch Faces the Senate*, N.Y. TIMES (Mar. 20, 2017), [www.nytimes.com/2017/03/20/opinion/neil-gorsuch-faces-the-senate.html](http://www.nytimes.com/2017/03/20/opinion/neil-gorsuch-faces-the-senate.html).

22. Editorial, *Neil Gorsuch, The Nominee for a Stolen Seat*, N.Y. TIMES (Jan. 31, 2017), [www.nytimes.com/2017/01/31/opinion/neil-gorsuch-the-nominee-for-a-stolen-seat.html](http://www.nytimes.com/2017/01/31/opinion/neil-gorsuch-the-nominee-for-a-stolen-seat.html).

23. *Compare Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984) (asking courts to determine whether an administrative agency's interpretation of a statute "is based on a permissible construction of the statute"), with *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]here's an elephant in the room with us today. . . . [T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

in these debates cared about, much less discussed, Neil Gorsuch's views on matters that are much more central to our actual constitutional order than the usual politically sensitive subjects. What about *Wickard v. Filburn*?<sup>24</sup> *Wickard* is an obvious example of a truly important area of concern, as it embraced a reading of the Commerce Clause that would appall the apparently dedicated originalist Justice Gorsuch appears to be. In this instance, it is the dreaded "substantial effects" principle, under which Congress may regulate a purely local activity "if it exerts a substantial economic effect on interstate commerce."<sup>25</sup> Then there is *Garcia v. San Antonio Metropolitan Transit Authority*, another obvious choice for originalist ire, resolving as it did a longstanding debate about whether Congress could use the commerce power to regulate the states.<sup>26</sup> *Garcia* placed the State of Missouri, to choose one example, in the same category as a distillery,<sup>27</sup> a lumber mill,<sup>28</sup> and a steamboat company.<sup>29</sup> Is it appropriate to reduce state "sovereigns" to "mere" commercial actors? Would the Framers and Founders accept "federal regulation of the janitor of a State building" as within the power of the Commerce Clause?<sup>30</sup> Doubtful.

Ruminations on the opportunities and challenges posed by teaching the Fourteenth Amendment are accordingly appropriate. For better or worse, issues posed by that provision dominate constitutional discourse. This does not mean that we actually spend much time looking at the entire Amendment. Mostly, we study Section 1. Even then, the Privileges and Immunities Clause is relegated to secondary status, an exile arguably justified by the Court's evisceration of that provision in the *Slaughter-House Cases*.<sup>31</sup> Some attention is paid to the enforcement powers granted by Section 5, albeit almost always as a variant on the due process/equal protection emphasis that defines "appropriate" legislation in the light of the level of judicial scrutiny afforded certain rights and certain

24. 317 U.S. 111 (1942).

25. *Id.* at 125. That was true even "though it may not be regarded as commerce." *Id.* The reality that *Wickard* contemplated regulation of any activity, "whatever its nature," *id.*, was conveniently ignored by Chief Justice William H. Rehnquist in *United States v. Lopez*, 514 U.S. 549 (1995), in which the Chief blithely quoted this language from *Wickard* and then ignored its clear import when he declared that the federal commerce power embraced only "activities that arise out of or are connected with a commercial transaction." *Id.* at 561. He and his brethren had every right to impose this "economic activity and only economic activity" limitation. They also had an obligation to be candid about what they were doing.

26. 469 U.S. 528, 530–58 (1985).

27. *See* *Kidd v. Pearson*, 128 U.S. 1, 10, 26 (1888).

28. *See* *United States v. Darby*, 312 U.S. 100, 108, 123–24 (1941).

29. *See* *Gibbons v. Ogden*, 22 U.S. 1 (1824).

30. RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 130 (1987).

31. 83 U.S. 36, 74–75 (1873) (limiting the scope of the Clause). *But see* *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999) (breathing life into the Clause's protection of the right to travel and guarantee that once an individual becomes a citizen of a state that person has the privileges and immunities "enjoyed by other citizens of the same State").

groups of people.<sup>32</sup> Then there is Section 2, which some of us have worried about in the past, largely to no avail.<sup>33</sup> Sections 3 and 4? Well, with the possible exception of someone writing for this issue, who cares?

I now take this process one step further, concentrating my attention on the Equal Protection Clause and, more narrowly, equal protection litigation where the claim is that a given government action initiates or perpetuates discrimination in the structure and delivery of K-12 public education. And I ask, why teach *Brown*?

## II. *BROWN* IN THEORY AND *BROWN* IN FACT

Very few cases decided by the Supreme Court achieve iconic status, and very few constitutional principles are regarded as central to our identity as a nation. *Brown* is an iconic case.<sup>34</sup> In his Childress Lecture providing the introduction to a symposium marking *Brown*'s fiftieth anniversary, William E. Nelson declared that *Brown* is "surely the most important case decided in the Twentieth Century by the Supreme Court of the United States."<sup>35</sup> The constitutional principles for which *Brown* stands, in turn, are viewed as indisputable and indispensable. The Court has emphasized repeatedly that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."<sup>36</sup> In particular, "racial discriminations are in most circumstances

32. Compare *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67 (2000) (declining to abrogate state sovereign immunity for claims of discrimination on the basis of age), and *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364, 367–68 (2001) (same, for disability), with *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729–30 (2003) (holding that abrogation is proper for claims of discrimination on the basis of gender), and *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (permitting abrogation when a state denies the fundamental right of access to the courts). The Court's abrogation inquiry is whether the legislative remedy is "congruent and proportional" to the constitutional violation. *Hibbs*, 538 U.S. at 737. Most of us have enough sense to cut through that high-falutin' gobbledy-gook and ask, does the classification or right get heightened scrutiny? If so, a constitutional violation is possible, and abrogation is permissible.

33. See, e.g., Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121 (1994).

34. Even here, caution is called for. As Scott Powe reminds us, it was one thing for the Court to discard separate but equal in *Brown I*, quite another to make that action a legal and educational reality. The remedial questions posed and supposedly answered in *Brown II* were accordingly extraordinarily important. But the decision itself, and the "all deliberate speed" process it initiated, were another matter entirely. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 50–70 (2000) (discussing *Brown II* and its initial implementation).

35. William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795, 795 (2004).

36. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745–46 (2007) (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 214 (1995)).



irrelevant and therefore prohibited.”<sup>37</sup> This reflects the reality that a racial classification “demeans the dignity and worth of a person [who is] judged by ancestry instead of by his or her own merit and essential qualities.”<sup>38</sup>

The “rules” are clear. Race is a “suspect” classification, a primary exemplar of a “discrete and insular minority” whose protection requires “more searching judicial inquiry.”<sup>39</sup> This means “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and are “subject . . . to the most rigid scrutiny.”<sup>40</sup> In its current formulation, we describe this as “strict scrutiny,” which means that “such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”<sup>41</sup> Famously characterized under its most rigid form as “‘strict’ in theory and fatal in fact,”<sup>42</sup> this level of review erects a daunting barrier that few if any racial classifications can survive. Indeed, it is fair to say that no traditional form of racial segregation or discrimination has withstood strict scrutiny and that only a limited number of so-called “benign” or “affirmative” such measures have emerged intact from this judicial cauldron.<sup>43</sup>

*Brown* is then a perfect example of this. Except it isn’t. The *Brown* Court does not lay out any of the elements of what we have just discussed. It simply declares that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>44</sup> There is no mention of discrete or insular minorities, compelling interests, or narrow tailoring. Those notions might be present in one or more of the numerous prior cases that the *Brown* Court cites and, in some instances, quotes.<sup>45</sup> But they are not part and parcel of the discussion in *Brown* and a reasonable reader would have no idea that they are elements of the applicable legal framework.

Some of this is understandable. *Brown* was litigated and decided at a point where the current equal protection doctrines and rules were still evolving. The first use that I could find of the descriptor “strict scrutiny” in the modern sense occurred in 1942, when the Court stated: “our view that strict scrutiny of the

37. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

38. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

39. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

40. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

41. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

42. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

43. See, e.g., *Grutter*, 439 U.S. at 322–44 (holding that University of Michigan Law School’s use of race in admissions furthered a compelling interest and was narrowly tailored).

44. *Brown v. Bd. of Educ.*, 347 U.S. 484, 495 (1954). “Separate but equal” is, of course, the formula for invidious discrimination embraced by a narrow majority of the Court in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

45. See, e.g., *Brown*, 347 U.S. at 491–92 (“Six cases involv[e] the ‘separate but equal’ doctrine in the field of public education.”); *id.* at 493 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)); *id.* (quoting *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950)).

classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”<sup>46</sup> This was followed quite soon by *Korematsu*’s use of what is in effect the current formulation, when the Court (mistakenly, we now know) credited the government’s claims of true national security threats and accepted the contention that “the need for action was great, and time was short.”<sup>47</sup> Over time, the Court developed an analytic framework within which it spoke of “strict scrutiny” and the need to use the “compelling state interest test” when the government invoked “any suspect criterion such as race, nationality, or alienage.”<sup>48</sup> But the first extended application of the current two-part formula in a case involving racial classifications did not come until 1978, in *Regents of the University of California v. Bakke*.<sup>49</sup>

It is in one respect then hardly surprising that this line of analysis was not followed in *Brown*. Except, of course, for the fact that on that very same day, in a companion case, the Court did declare that “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”<sup>50</sup> That allusion to what we now regard as the “Black Letter” understanding is telling in two ways. It shows that the Court was well-aware of the framework within which modern equal protection doctrine was being developed. But it also reveals the extent to which the Court believed it essential to focus not on dry, legal abstractions—i.e., the Black Letter Rules—but rather on the need to recognize that “[o]f the ideals that animated the American nation at its beginning, none was more radiant or honored than the inherent equality of mankind.”<sup>51</sup> *Brown* was, as Richard Kluger’s magisterial study tells us, a matter of *Simple Justice*.

A second major problem with *Brown*, at least for those who might need to litigate such matters today, is that it does not provide either the general matrix within which such causes of action are evaluated (suspect class, strict scrutiny, etc.), or the specific tests a court will apply to a school desegregation claim.

46. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

47. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944). In effect, the government lied to the Court. See Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, DEP’T JUST. ARCHIVES (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-general-mistakes-during-japanese-american-internment-cases> [https://perma.cc/E7HT-CRF2].

48. *Graham v. Richardson*, 403 U.S. 365, 375 (1971).

49. 438 U.S. 265, 289–99 (1978). Even here, the Powell opinion concludes its analysis with the statement that “[w]hen [classifications] touch on an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.” *Id.* at 299.

50. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

51. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY*, at xi (1976).

Cases decided in the wake of *Brown* have placed a strong emphasis on two critical factors, especially in a jurisdiction where there was no constitutional or statutory mandate to operate a dual system. A prima facie case is not made out by arguments about “the effect of segregation itself on public education.”<sup>52</sup> Rather, it requires that a litigant show two things: intentional governmental actions that were designed to create or maintain segregated schools, and the existence of racially identifiable schools caused by those actions.<sup>53</sup> The current cases have also added an additional complicating factor: the extent to which claims that government motives are “benign” or “affirmative” might change the analysis, not by relaxing its rigor,<sup>54</sup> but rather by shedding new light of what sorts of interests might be deemed compelling. If as Justice Harlan alleged, “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens,”<sup>55</sup> does that mean that the desire to help a group previously burdened cannot justify race-based actions?<sup>56</sup>

Simply put, *Brown* was an easy case, assuming we accept its central premise: that the Constitution simply will not tolerate state actions that “separate [children] from others of similar age and qualifications solely because of their race,” since it “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>57</sup> It was in this sense that *Brown* represented a judgment that any “explicit racial classification [that] imposes burdens on one race [will be] struck . . . down without reference to purpose.”<sup>58</sup>

52. *Brown v. Bd. of Educ.*, 347 U.S. 484, 492 (1954).

53. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200–05 (1973). *Keyes* highlighted an important consideration for litigants in the wake of *Brown*: the distinction between “a school district where a dual system was compelled or authorized by statute,” *id.* at 255 (Rehnquist, J., dissenting), and one where there are simply “racially inspired school board actions.” *Id.* at 203; see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17–18 (1971) (noting the potential problems posed by “de facto segregation,” a racial imbalance in schools absent a showing of discriminatory action of school authorities).

54. See *Adarand Constructors v. Peña*, 515 U.S. 200, 224 (1995) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.” (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989))).

55. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

56. So, for example, in *Parents Involved* the school districts believed that diversity in K-12 education should be deemed a compelling governmental interest and that race-based school assignments should be permitted. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007). The plurality did not reach that question, holding that the measures were not narrowly tailored. *Id.* at 723–25. Indeed, Chief Justice Roberts articulated a color-blind principle on steroids, declaring that: “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 748.

57. *Brown*, 347 U.S. at 494.

58. Survey, *Equal Protection*, 82 HARV. L. REV. 1065, 1091 n.86 (1969) (citing *Brown* as the example).

School desegregation cases brought today will be much more difficult to litigate and prove. I never say never when the question is whether a government actor will do something truly stupid. We have (hopefully) left behind the days of the Southern Manifesto,<sup>59</sup> when discrimination could be explained and defended as a proper regard for “habits, customs, traditions, and way of life.”<sup>60</sup> State legislatures and local school boards are simply not going to pass measures that place before all to see the express goal of intentionally separating school children on the basis of race, ethnicity, or national origin. But that is what it likely takes to provide a plaintiff with an iron-clad case: a government decision that clearly and intentionally creates, or, in the wake of prior such actions, perpetuates, racially identifiable schools. Read with care, that is the standard the post-*Brown* cases impose.

Even here, there are hidden dangers. Most of the cases were decided during a period where the Court was receptive to such claims and the cumulative, negative effects of the prior *de jure* segregation regime were impossible to ignore. That’s not the world we live in today. In particular, it is not the world where the neighborhood school principle collides with the reality that population and attendance patterns can and will produce racially identifiable schools in circumstances where there is scant apparent connection to actual government action.

Consider, for example, the problems posed by one of today’s educational fads: school choice. Today’s choice advocates champion these programs as ways to allow parents to find a suitable school for their children and, by “voting with their feet,” to put pressure on schools and school boards to improve sub-standard schools. There is much to be said for this. But what do you do when school choice is made available in a jurisdiction where the present effects of past discrimination remain, and virtually unrestricted school choice becomes a means for promoting white flight?<sup>61</sup>

59. See 102 CONG. REC. 4515, 4515 (1956) (remarks of Rep. Smith) (discussing and placing in the record a “Declaration of Constitutional Principles” now known as the Southern Manifesto). For a comprehensive treatment of the Manifesto, see Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014).

60. 102 CONG. REC. 4516. For an insightful discussion of these issues, see JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975* (2006).

61. See, e.g., *Teague ex rel. T.T. v. Ark. Bd. of Educ.*, 873 F. Supp. 2d 1055, 1061 (W.D. Ark. 2012) (listing under “Stipulated Facts” the substantial racial disparities between two school districts); *Hardy v. Malvern Sch. Dist.*, 2010 WL 956696, at \*2 (W.D. Ark. 2010) (noting as an “undisputed material fact” that there were approximately 300 students illegally enrolled at majority-white school districts and that “[e]ach of these students was Caucasian”). *Teague* and *Hardy* were two of the many cases litigated in Arkansas in which the underlying claim was that unrestricted school choice facilitated white flight in a state where attendance patterns reflect a long and unfortunate history of state-sanctioned segregation.

Post-*Brown* cases provide a way for individuals concerned about such matters to assert a claim that school choice programs that are not predicated on documented educational needs pose real risks of abuse and, where they lead to white flight, constitutional violations. The Warren and Burger Courts were, for example, willing to finesse the intent component by holding that “actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.”<sup>62</sup> In a similar vein, they restricted the ability to argue that the problem complained of was simply a private act or decision, stating in no uncertain terms that “[r]acial discrimination in state-operated schools is barred by the Constitution and ‘[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.’”<sup>63</sup> A legislature or school board might argue, perhaps correctly, that promoting white flight was not what they had in mind when they passed the statute allowing choice. What do they say, then, in the face of evidence that such flight is occurring, given the Court’s declaration that “[a]dherence to a particular policy or practice, ‘with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.’”<sup>64</sup>

These and similar post-*Brown* precepts arguably remain good law.<sup>65</sup> They are, nevertheless, principles that arise outside of *Brown* and may or may not appear in the casebooks. They are also cases and rules that may well be repudiated or limited by a Court that does not now view these matters in the same way as the Warren and Burger Courts. Indeed, perhaps the most troubling prospect for *Brown* is the possibility of a Supreme Court in particular, and federal bench in general, that embraces an “originalist” view of the Constitution. This is neither the time nor the place to probe the various possible strands of

62. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *see also* *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538–39 (1979) (noting the legal significance of both “acts or omissions” (emphasis added)).

63. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (alteration in original) (quoting *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967)); *accord* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (stressing that government actors should not become “passive participant[s]” in racial exclusion fostered by private actors).

64. *Penick*, 443 U.S. at 465 (quoting *Penick v. Columbus Bd. of Educ.*, 425 F. Supp. 229, 255 (S.D. Ohio 1977)).

65. I refuse to teach one such line of post-*Brown* cases, those that articulate a “political process” principle under which the Court invalidates government actions that “aggravat[e] . . . the very racial injury in which the State itself was complicit.” *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1633 (2014); *see also* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 467, 470 (1982); *Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967). I stopped teaching these cases a long time ago. They were simply too complicated to explain and, as the result in *Schuette* demonstrates, too problematic in today’s climate.

originalism and their application to the question the Court asked, and avoided, in 1954: “What evidence is there that” the individuals who drafted, debated, and ratified the Fourteenth Amendment “contemplated, or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?”<sup>66</sup>

The Court asked for reargument on this question and it was extensively researched and briefed by the parties and their many friends. The Court then declared that “[t]his discussion and our own investigation convinced us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”<sup>67</sup> That is, at best, a punt. The question is not whether the individuals who framed and ratified the Amendment expressly contemplated school desegregation. It is, rather, whether they tolerated or even encouraged it when they returned home, especially in the northern states. If, as most strands of originalism propose, the question is properly answered in terms of what the people who ratified a textual provision or an amendment actually did themselves when they structured and delivered K-12 education, the answer must surely be a resounding: “No, the Fourteenth Amendment does not bar such actions.”<sup>68</sup>

Consider, for example, Ohio, the home state of the Fourteenth Amendment’s principal author and champion, John Bingham. As the United States noted in the materials it submitted to the Court, Ohio’s “general school law of 1864, which was in force at the time of Ohio’s ratification of the Fourteenth Amendment, authorized and required separate schools for colored children whenever their number in a district or in adjoining districts exceeded twenty.”<sup>69</sup> Indeed, the United States continued, in 1871 the Supreme Court of Ohio, in “the first case in which the highest court of a State passed on the effect of the Fourteenth Amendment on racial segregation in the schools,” declared that “the school segregation law of the State did not violate the Fourteenth Amendment.”<sup>70</sup>

66. *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953).

67. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

68. In the brief he filed on behalf of the State of South Carolina on reargument, for example, John W. Davis stressed that “of the thirty-seven states in the Union at the time of the adoption of the Fourteenth Amendment, ‘23 continued, or adopted soon after the Amendment, statutory or constitutional provisions calling for racial segregation in the public schools.’” KLUGER, *supra* note 51, at 546.

69. Appendix to the Supplemental Brief for the United States as *Amicus Curiae* at 329, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), *reprinted in* 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 334 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

70. *Id.* at 330, *reprinted in* LANDMARK BRIEFS, *supra* note 69, at 335 (citing *Ohio ex rel. Garnes v. McCann*, 21 Ohio St. 198 (1871)). The *Garnes* court reasoned that since the state did not deny “the citizenship of colored persons, and their right to the ‘equal protection of the laws’” prior to the ratification of the Fourteenth Amendment, the Amendment contains “nothing conflicting

It remains to be seen if the individual currently occupying the office of the President will be able to nominate and secure confirmation of additional members of the Court in the originalist mode he seems to champion. Just as it remains to be seen if Justice Gorsuch's originalist creed takes him down a road that not even Robert Bork was willing to travel.<sup>71</sup> Be that as it may, the original understanding/intent problem provides one final note of caution regarding the place for *Brown* in the teaching canon.

### III. *BROWN* IS DEAD! LONG LIVE *BROWN*!!

So why teach *Brown*? Why teach a case that doesn't provide much help in terms of the governing law? The simple answer is almost certainly the same one that impelled the Court to do what it did in *Brown*: there is law, and then there is justice. In some very key instances, they are just not the same. *Brown* may or may not be "emblematic of the Court's position as a defender of minority rights and as the avant-garde in social justice struggles generally."<sup>72</sup> Regardless, it is important for our students to consider *Brown* in the light cast by a fuller sense of what are, and are not, exemplars of justice in our political, legal, and social systems.

As I noted at the outset of this Essay, appeals to Thomas Jefferson as an adherent to the American ideal of liberty and justice for all are fraught with risk.<sup>73</sup> This is not simply a matter of did he or didn't he, Sally Hemmings division. It is, rather, a complex mix of what Jefferson actually thought about "all men" and what the Constitution actually created in 1787. Jefferson's musings on the nature of "blacks" in his *Notes of the State of Virginia* place his general views on equality in a far different light than is the norm. In a similar vein, Chief Justice Roger Brooke Taney's statements about race and slavery in *Dred Scott* bear closer examination. The received wisdom is that we must reject out of hand, with vigor, both Taney and *Dred Scott*.<sup>74</sup> Except, what exactly is it that Taney said in that case? The key passages, properly understood, are not simple paeans to the glories of slavery and denunciations of slaves as mere chattel. Rather, they are unfortunately accurate descriptions of the manner in which the individuals who crafted the Constitution approached the question of

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with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case." *Garnes*, 21 Ohio St. at 209.

71. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 74–84 (Simon & Schuster Inc. 1991) (1990) (arguing the *Brown* Court properly articulated a "presumption of freedom" that the framers did not understand).

72. Richard Thompson Ford, Symposium, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1305 (2004).

73. See *supra* note 8 and accompanying text.

74. That was generally true before the current monuments and men kerfluffle triggered by the unfortunate events in Charlottesville, Virginia. It is even more pronounced now.

slavery, given the need to fashion a compromise that would keep the southern states in the federal fold.

The question, Taney says, “is, whether the class of persons described in the plea . . . compose a portion of this people, and are constituent members of this sovereignty?”<sup>75</sup> His answer was not that slaves are inherently inferior as a matter of law and fact, although he almost certainly believed that such was the case. It was, rather, that the individuals who drafted and ratified gave us an instrument predicated on the assumption that in 1787 slaves were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”<sup>76</sup> He then made it quite clear that this was true in spite of what the *Declaration of Independence* had to say about “the whole human family.”<sup>77</sup> Jefferson and company, Taney stressed, “perfectly understood the meaning of the language they used” and “knew that it would not in any part of the civilized world be supposed to embrace the negro race.”<sup>78</sup>

Demeaning? Yes. Utterly unfounded? Absolutely. Inaccurate, in the sense that it did not represent the views of the individuals who demanded the protection of slavery as the price of ratification? No. I have not reviewed the countless constitutional law casebooks to determine how each treat *Dred Scott* and whether their edits of the case provide the text and context to see exactly what Taney was saying. I suspect that many do not. Even as I also suspect that virtually every casebook includes the full text of *Brown*.

*Brown* does not mention, but clearly repudiates *Dred Scott*. That is part of its appeal. It is also not a decision whose moral force depends on its step-by-step analysis and rejection of all prior precedents. But that strength can be a weakness when the case is part of a course within which the focus is on traditional legal analysis, appeal to precedent, and the other virtues and vices that inhere to what some have described as a quest to teach students to “think like a lawyer.”

A far more compelling reason to teach *Brown* is the story of the decision itself: the long, rich, and inspiring narrative that is the full account of the four school segregation cases that came to the Court in 1953. *Brown* itself was one of four cases on appeal that were heard together by the Court.<sup>79</sup> The others

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75. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857).

76. *Id.* at 404–05.

77. *Id.* at 410.

78. *Id.*

79. *See Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951). One of the interesting historical artifacts is that in this case, and the others brought in federal court, the matters were tried to a three-judge district court, with a concomitant right of direct appeal to the Supreme Court. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954) (outlining the litigation that led to *Brown*).



challenged school segregation in South Carolina,<sup>80</sup> Virginia,<sup>81</sup> and Delaware.<sup>82</sup> There are also the many that followed in its wake, both to enforce the *Brown* principles,<sup>83</sup> and extend them far beyond the limited confines of separate but equal in public education.<sup>84</sup> We may or may not teach these cases, or even mention them. They are nevertheless key elements in the full story of *Brown*.

There are also the practical dimensions and realities of “landmark” litigation. There is a tendency on the part of students and the body politic alike to think that a lawsuit is a quick and easy solution to pressing problems. The classic civil rights chant captures this nicely. What do we want? Justice! When do we want it? Now! That’s not the real world of civil rights and civil liberties litigation. It was certainly not the world or reality that produced that decision. *Brown* was the culmination of a protracted and painstakingly crafted strategy that proceeded one small step by one small step toward an ideal, yet to be fully realized: the attainment of true equality for African Americans in a nation that had enslaved their ancestors and then subjected those who followed to subjugation, violation, and myriad gross indignities.

That process was initiated by the National Association for the Advancement of Colored People (“NAACP”) in the early years of the twentieth century. One of the first targets was housing, in the form of statutes that barred the sale of property to African Americans. In 1917, in language that presaged doctrinal developments yet to come, the Court characterized a combination of constitutional and statutory guarantees as ones that protected “those fundamental rights in property which [they were] intended to secure upon the same terms to citizens of every race and color.”<sup>85</sup> “The Fourteenth Amendment,” the Court declared, “and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.”<sup>86</sup>

I suspect we would search in vain in virtually every constitutional law casebook for any protracted consideration of *Buchanan*. That may be a good

80. *Briggs v. Elliott*, 98 F. Supp. 529, 530 (E.D.S.C. 1951).

81. *Davis v. Cty. Sch. Bd. of Prince Edward Cty.*, 103 F. Supp. 337, 338 (E.D. Va. 1952).

82. *Belton v. Gebhart*, 87 A.2d 862, 863 (Del. Ch. 1952).

83. *See, e.g., Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 439 (1968) (rejecting “all deliberate speed” and imposing on the school board the obligation to fashion a desegregation plan that “promises realistically to work, and promises realistically to work *now*”). In a companion case, *Raney v. Board of Education of the Gould School District*, 391 U.S. 443, 447 (1968), the Court rejected a precursor to the school choice program now at issue in Arkansas. *See supra* note 61 and accompanying text.

84. *See, e.g., State Athletic Comm’n v. Dorsey*, 359 U.S. 533, 533 (1959) (per curiam) (barring racial discrimination in “athletic contests”); *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (1955) (per curiam) (same, public golf courses); *Baltimore v. Dawson*, 350 U.S. 877, 877 (1955) (per curiam) (same, public beaches and bathhouses).

85. *Buchanan v. Warley*, 245 U.S. 60, 79 (1917).

86. *Id.*

thing in one sense. More than once, the Court mentioned the fact that the statute in question “den[ied] [a white the ability] to dispose of his property” only because he wished to sell it to a “person of color.”<sup>87</sup> The Court also rejected an attempt to question *Plessy* and separate but equal, stating that “[t]he most that was done was to require him as a member of a class to conform with reasonable rules in regard to the separation of the races.”<sup>88</sup> The evil condemned was an absolute denial of access, rather than differential treatment. *Buchanan* was nevertheless a notable victory and laid important foundations for what was to come.<sup>89</sup>

*Brown* itself mentions the next essential phase, the various cases brought to end racial segregation in higher education. Two things were important here, one that our students should recognize, and one that is alien to them. The first and obvious consideration is that post-secondary education then and now is not compulsory and, with the rare exception of a prodigy, does not involve children. The second, which is harder for the current generation to grasp, is one that the litigation arm of the NAACP, the so-called Inc. Fund, realized as it launched its attack on segregation in higher education. In the years before and immediately after World War II, before the G.I Bill took effect, attending college was the exception rather than the rule for most Americans, with graduate and professional education an even less frequent course taken. In effect, this meant that these cases focused on much easier targets. Few families and individuals had a stake in what was being attacked, and those that did were in important respects victims of their own choices. Those limitations evaporated when the focus was shifted to matters that involved virtually every American family, systematic, compulsory public K-12 education.

In a series of cases stretching from 1937 to 1950, the Inc. Fund laid waste to various schemes designed to keep African-American students out of this nation’s public colleges and universities. Most of these involved rather feeble attempts to invoke separate but equal through the creation of palpably inferior educational institutions.<sup>90</sup> Some were more creative, like the Missouri scheme

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87. *Id.* at 78.

88. *Id.* at 80 (quoting *Carey v. City of Atlanta* 84 S.E. 456, 459 (Ga. 1915)).

89. These victories included any number of important cases that are taught that involve voting rights, *see, e.g.*, *Smith v. Allwright*, 321 U.S. 649, 661–62 (1944), and restrictive covenants, *Shelley v. Kramer*, 334 U.S. 1, 20–21 (1948).

90. *See Sweatt v. Painter*, 339 U.S. 629, 634, 636 (1950) (stressing that the education offered at a separate law school for minority students was not “substantially equal to that [offered] at . . . the University of Texas Law School” and ordering Heman Sweatt’s admission to that institution); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 640–41 (1950) (“The restrictions [imposed on the graduate student] impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, 632 (1948) (*per curiam*) (holding that the state could not reject a law school applicant on account of her race because she is “entitled to secure legal education afforded by a state institution”).

that authorized payment of the educational expenses “for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent states.”<sup>91</sup> All failed, as the Inc. Fund and a receptive Court took aim at policies that did not offer “substantial equality in the educational opportunities offered white and Negro . . . students.”<sup>92</sup>

Finally, there are the internal facts of the *Brown* litigation itself, many of which range beyond even the most creative law professor hypotheticals. The most important is arguably the story of Thurgood Marshall, who was denied the opportunity to study law at his home institution, the University of Maryland, and forced instead to get his degree at Howard University.<sup>93</sup> Marshall’s life story is that of an individual of uncommon gifts who overcame substantial obstacles to assume a prominent role in the struggles against systematic racial discrimination. As the Legal Director of the Inc. Fund he litigated virtually all the major desegregation and discrimination cases that came before the Court. And as the first African American to sit on that bench, he brought rare insights and wisdom to the administration of justice from his appointment in 1967 until his retirement in 1991.

Then there is the role of fate and happenstance. It is somewhat common knowledge that *Brown* was argued twice. The first time was in December 1952. The Court was closely divided and it seemed certain that any decision it might issue would be deeply divisive, both in terms of the Court itself and in its potential impact in a nation where significant segments of the population—and not simply in the South—were deeply opposed to the integration of the public schools.<sup>94</sup> The Chief Justice at the time was Fred Vinson, a Son of the South whose Kentucky ancestors were slave holders and a man who has appropriately been described as someone who was “reluctan[t] to advance African American rights beyond a line he judged not to be intrusive on white sensibilities.”<sup>95</sup> Led by Justice Felix Frankfurter, a block on the Court secured agreement that the cases should be held over for reargument, primarily on the question of the history and intent of the Fourteenth Amendment, but also on the remedial questions posed by the cases. It was at this point that the hand of fate intervened. On September 8, 1953, Fred Vinson suffered a heart attack and died. Learning of this, Justice Frankfurter, convinced that a major obstacle to a just resolution of

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91. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 348 (1938).

92. *Sweatt*, 339 U.S. at 633.

93. Marshall’s story and career are discussed throughout KLUGER, *supra* note 51. For a more focused treatment, see MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* (1994).

94. *See generally* KLUGER, *supra* note 51, at 587–616 (detailing the post-argument discussions and the disparate positions being taken by various members of the Court).

95. *Id.* at 592.

*Brown* had now vanished, told one of his former clerks “[t]his is the first indication I have ever had that there is a God.”<sup>96</sup>

Vinson’s death led to a decision that would have a profound impact on *Brown* and on constitutional law and the Supreme Court in general. When the Court reconvened for the second set of arguments in *Brown* the center seat on the bench was occupied by Earl Warren, the new Chief Justice of the United States. Warren may, or may not, have owed his nomination by President Dwight Eisenhower to his decision to eschew his favorite son status and place the California delegation behind Eisenhower’s candidacy at the Republican National Convention in 1952.<sup>97</sup> He certainly was someone whose deep involvement in the “resettlement” of California’s Japanese-American citizens during the early years of World War II gave him profound insights into a principle articulated by the Court in 1943, albeit not honored in the case in which it was pronounced: “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>98</sup>

Warren’s leadership of the Court in the wake of the reargument proved decisive. He was able to bring the Justices together behind a single, unanimous opinion. That unanimity was critical. It did little to assuage the citizens of the South, who were appalled that they were now confronted with the prospect of sending their sons and daughters to school with children that many of them deemed inferior. It also, for that matter, was a less than thrilling result for many individuals in the North, who harbored racist sentiments no less pronounced than their southern brethren that they hid behind a veneer of tolerance.<sup>99</sup>

Neither Vinson’s death nor Warren’s nomination and confirmation were part of the *Brown* litigation strategy. Both were nevertheless critical to its success. And both are elements of an approach to teaching *Brown* that give students a deeper appreciation for the many factors, planned and unplanned, that combine to yield a result in a case.

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96. *Id.* at 659.

97. Eisenhower told Warren in December 1952 that while he would not have a place in his Cabinet, “I intend to offer you the first vacancy on the Supreme Court.” BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 2 (1983). When Vinson died, there were apparently second thoughts, but Eisenhower did tender the nomination, supposedly convinced that Warren had the qualities that would make him an effective Chief Justice, even in the absence of prior judicial experience. *See id.* at 3–6; KLUGER, *supra* note 51, at 663–66.

98. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

99. I routinely tell my students, many of whom are proud Southerners, that the South should be commended for having the visible courage of its convictions and that some of the worst racists I ever met were from Boston, the self-styled Hub of the Universe.

## CONCLUSION

In the Holmes Lecture he delivered on April 7, 1959, Professor Herbert Wechsler had the temerity to suggest that *Brown* was problematic.<sup>100</sup> *Brown*, he argued, was poorly reasoned, a case in which “the separate-but-equal formula was not overruled ‘in form’ but was held to have ‘no place’ in public education on the ground that segregated schools are ‘inherently unequal.’”<sup>101</sup> As such, it did not embody what he believed to be a proper approach: “one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”<sup>102</sup> Wechsler’s critique was wide-ranging and criticized a number of decisions he found wanting. Nevertheless, he singled out *Brown*. The reaction was swift and predictable. Then-Professor Louis H. Pollak, for example, conceded some of *Brown*’s arguable shortcomings,<sup>103</sup> things he well understood as one member of the team that litigated the cases.<sup>104</sup> But he also declared that “the judgment in the segregation cases will as the decades pass give ever deeper meaning to our national life. It will endure as long as our Constitution and democratic faith endure.”<sup>105</sup>

I’m not for a minute intimating that my flirtations with relegating *Brown* to the pedagogical recycle bin places me in the same company as Professor Wechsler and Judge Pollak. I know better. I also understand that most constitutional law professors reading this piece will react with, at best, a resounding “duh” to many aspects of what I have said in this Essay. That said, I also believe that most professors accord *Brown* a central place in their syllabi as a matter of reflex rather than reflection. Which may or may not be a problem, depending on how they teach the case.

The best possible approach to the lessons that lie within and spring from *Brown* is not to teach the case itself, but rather to require that the students read widely in the history of discrimination. In particular, they need to learn the full story of the *Brown* litigation. The study of law in a law school is not, sad to say, an academic exercise in the traditional sense. We teach in professional schools that, by and large, confer first professional degrees. We think of ourselves as scholars, but our students are not enrolled in the sorts of courses that prepare them for academic research. And neither our curricula or courses are the sort

100. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

101. *Id.* at 32.

102. *Id.* at 19.

103. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24 (1959).

104. See, e.g., Louis H. Pollak, *From Cardozo to Dworkin: Some Variations on Professor Nelson’s Theme*, 48 ST. LOUIS U. L.J. 859, 859 (2004).

105. Pollak, *supra* note 103, at 31.

that typify a true graduate school, where extensive and deep reading are the norm.

We cannot accordingly make the sorts of reading assignments that are the norm in advanced courses in history or political science. Richard Kluger's *Simple Justice* is 778 pages long and everyone who purports to care about the Constitution and racial justice should read it. Which is to say, every law student. I wish I could assign it and expect each of my students to read it with care. I can't. Not, that is, if I am expected to cover in any sort of depth all of the myriad constitutional provisions and cases that are essential parts of a four-credit hour introductory course. Or, more tellingly, if I wish to retain even a modicum of good will on the part of students who believe they are already overburdened simply reading edited cases.

So, I am left with two choices: eliminate *Brown* from the syllabus or teach it as best I can, with a very strong emphasis on all the issues, events, and contexts that are not part and parcel of that eloquent but exceedingly terse opinion. For the time being, *Brown* lives in my constitutional law course. Whether that continues to be the case is something only time will tell.

